

STATE OF MICHIGAN
COURT OF APPEALS

ARTHUR OSTASZEWSKI,

Plaintiff-Appellee,

v

CITY OF LANSING,

Defendant-Appellant.

UNPUBLISHED

November 15, 2018

No. 343537

Ingham Circuit Court

LC No. 17-000776-CZ

Before: RIORDAN, P.J., and RONAYNE KRAUSE and SWARTZLE, JJ.

PER CURIAM.

In this action under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, defendant appeals as of right the trial court's order denying its motion for summary disposition under MCR 2.116(C)(8) and granting plaintiff's motion for summary disposition. Neither plaintiff nor the trial court identified which subsection of MCR 2.116(C) supported plaintiff's motion. Given that the trial court's ruling relied on facts outside of the complaint, however, we conclude that plaintiff's motion was granted under MCR 2.116(C)(10).

For the reasons set forth below, we reverse.

I. BACKGROUND

The relevant facts are not in dispute. Plaintiff and defendant were involved in a dispute, which led plaintiff to attend a meeting of the Lansing City Council. At the council meeting, the dispute was discussed and minutes were taken by the council clerk, Sherri Boak. Boak transcribed the minutes in real-time, but also audio-recorded the meeting in the event that her transcriptions were incomplete. If Boak missed anything during the meeting, she would fill that information in using the audio recording. This was an informal, personal procedure that Boak adopted; there were no council rules or procedures providing for or outlining the use of audio recordings during council meetings.

Plaintiff wanted to ensure that the meeting minutes were accurate and asked Boak not to destroy her personal recording. Plaintiff later filed a FOIA request with defendant, seeking a copy of the recording. Defendant denied the request given the personal nature of Boak's recording, but provided plaintiff with the official, typed minutes of the meeting. Unsatisfied, plaintiff sued defendant's FOIA coordinator, Amanda O'Boyle, seeking a copy of the recording.

O’Boyle moved for summary disposition, arguing that plaintiff had improperly named her as a defendant given that the public body, rather than its employee, is the proper party-in-interest in a FOIA action. The trial court granted O’Boyle’s motion, but allowed plaintiff an opportunity to amend his complaint to cure the defect.

Before plaintiff could file an amended complaint, defendant voluntarily provided plaintiff with the recording. Plaintiff then filed an amended complaint seeking punitive damages, fees, and costs for defendant’s purported untimely release of the requested recording. Both parties then moved for summary disposition. The trial court concluded that defendant’s initial denial of the FOIA request was arbitrary and capricious given that defendant’s timely release could have avoided the court proceedings altogether. The trial court denied defendant’s motion for summary disposition and granted plaintiff’s motion, concluding that plaintiff was entitled to punitive damages of \$1,000 for defendant’s untimely release of the recording under MCL 15.240(7) and court costs.

This appeal followed.

II. ANALYSIS

“We review de novo a trial court’s grant or denial of summary disposition.” *Tomra of North America, Inc v Dep’t of Treasury*, ___ Mich App ___, ___; ___ Nw2d ___ (2018) (Docket No. 336871); slip op at 2. A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint and is granted where no factual development could justify the relief sought. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). “A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the claim, and is appropriately granted when, except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law.” *Tomra*, ___ Mich App at ___; slip op at 2.

Before a trial court can assess punitive damages against a public body for failing to grant a FOIA request, the trial court must do two things. First, the trial court must “order[] the public body to disclose or provide copies of all or a portion of the [requested] public record.” MCL 15.235(4)(b). Then, the trial court must determine that the public body’s refusal or delay in disclosing or providing the record was arbitrary and capricious. MCL 15.235(4); MCL 15.240(7).

In this case, the trial court did not order defendant to disclose or provide the recording to plaintiff. Rather, defendant voluntarily provided the recording to plaintiff after the trial court granted plaintiff an opportunity to amend his complaint to add defendant as a party. Indeed, because defendant was not made a party to this case before it provided the recording to plaintiff, the trial court would have had no authority to order defendant to provide the recording to plaintiff. Thus, because defendant was not ordered by the trial court to disclose or provide the recording to plaintiff, plaintiff was not entitled to damages under MCL 15.240(7). *Local Area Watch v Grand Rapids*, 262 Mich App 136, 153; 683 NW2d 745 (2004). Accordingly, the trial court erred by granting plaintiff’s motion for summary disposition, and summary disposition for defendant was proper.

Reversed and remanded for entry of an order granting defendant's motion for summary disposition. We do not retain jurisdiction.

/s/ Michael J. Riordan

/s/ Amy Ronayne Krause

/s/ Brock A. Swartzle